Office Supreme Court U.S.
FILED
DEC 20 1901
JAMES H. McKENNEY,
Clerk.

No. 282. 910

Brf. of Ruggles for Petitioners.

Filed Dec. 20, 1901.

No. 282.

# In the Supreme Court of the United States,

October Term, A. D. 1901.

---

S. M. BURT and H. R. BURT, Petitioners,

vs.

THE UNION CENTRAL LIFE INSURANCE COMPANY, of Cincinnati, Ohio, Respondent.

---

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

---

## BRIEF AND ARGUMENT FOR S. M. BURT AND H. R. BURT, Petitioners.

---

GARDNER RUGGLES,
*Of Counsel with Petitioners.*

Hutchings Printing Co., Austin, Texas.

No. 282.

# In the Supreme Court of the United States,

October Term, A. D. 1901.

---

S. M. BURT and H. R. BURT, Petitioners,

vs.

THE UNION CENTRAL LIFE INSURANCE COMPANY, of Cincinnati, Ohio, Respondent.

---

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

---

## BRIEF AND ARGUMENT FOR S. M. BURT AND H. R. BURT, Petitioners.

---

To the Honorable the Supreme Court of the United States:

Petitioners, by their counsel, pray leave to present their view of this case as follows:

### I.

### STATEMENT OF THE CASE.

This action was brought originally in the District Court of Travis County, Texas, Fifty-third Judicial District, on the 26th day of October, A. D. 1898, by petitioners S. M. Burt and H. R. Burt, citizens of the State of Texas, against respondent, the Union Central Life Insurance Company of Cincinnati, Ohio, a citizen of the State of Ohio, and thereafter removed by said respondent to

the Circuit Court of the United States for the Western District of Texas, at Austin, Fifth Circuit, on the ground solely of diversity of citizenship between petitioners, plaintiffs in said cause, on the one hand, and respondent, defendant therein, on the other, which gave said Circuit Court jurisdiction of the cause. Respondent thereafter, on the 16th day of December, A. D. 1898, duly filed in said Circuit Court a copy of the record and proceedings in said cause in said State District Court, as required by law.

These proceedings do not appear in the record here for the reason that a stipulation was made between all parties and filed in said Circuit Court (Trans. pp. 18, 19), whereby, in order that the record of the cause for the United States Circuit Court of Appeals for the Fifth Circuit should not be unnecessarily encumbered, it was agreed that the transcript on error for that court should consist of copies of certain papers only, thereby excluding petitioners' original pleadings and the removal proceedings.

On the 7th day of July, A. D. 1899, petitioners, plaintiffs in said cause in said Circuit Court of the United States for the Western District of Texas, under leave of said court, filed therein their first amended original petition (Trans., pp. 2-8), a synopsis of which will give fully the nature of their case.

The first paragraph of said amended petition appropriately avers the character, residence and citizenship of the parties. (Trans., p. 2.)

The second paragraph avers the execution and delivery, about August 1, 1894, by defendant, a life insurance company, to one William E. Burt, of a policy of insurance on his life (copy of which, with its conditions, was attached as Exhibit A, and will be hereinafter noticed), whereby, in consideration of the annual payment to said company, at its home office, of one hundred and fourteen dollars and seventy cents, on or before July 30 of each year, at noon, for twenty years from date of policy, and payment of all notes given in payment or part payment of premiums, the company bound itself to pay to Anna M. Burt, the wife of said William E. Burt, if living, otherwise to his executors, administrators, or assigns, Five Thousand Dollars, within sixty days after receipt by it of notice and satisfactory proof of said William E. Burt's death. (Trans., p. 2.)

The third paragraph avers the conveyance, by written transfer, about September 10, 1895, by said beneficiary Anna M. Burt, joined by her husband, said William E. Burt, to plaintiffs, they being then and yet creditors of said Anna M. and William E. Burt, of a one-half interest in said policy and its proceeds, whereby plaintiffs became, and now are, the owners of and entitled to said share. (Trans., p. 3.)

The fourth paragraph avers the death, about July 24, 1896, of said Anna M. Burt, intestate, said William E. Burt being then still alive, as well as the deaths, same day, of said Anna M. and William E. Burt's two minor female children, Agnes Lucile and Anna E. Burt (both unmarried and without issue or descendants); said two children being the only issue or descendants of the marriage of said William E. and Anna M. Burt, or of either of them. (Trans., p. 3.)

The fifth paragraph avers the conveyance, by written transfer, about February 4, 1897, from said William E. Burt, who was then the sole owner and successor to all said Anna M. Burt's rights therein, to plaintiffs of the remaining half interest in said policy, making them owners of the whole of it. (Trans., p. 3.)

The sixth paragraph avers that plaintiffs are the sole heirs at law of said William E. Burt, and, as such, are entitled to the whole of said policy and its proceeds, there being no administration on his estate, nor necessity for one. (Trans., p. 3.)

The seventh paragraph avers that said William E. Burt, having been indicted for the murder of said Anna M. Burt, was tried and convicted about November 27, 1896, in the District Court of Travis county, Texas, Twenty-sixth Judicial District, a court of competent jurisdiction, of murder in the first degree, and his punishment assessed at death, although the defense of his insanity was interposed and put in issue on said trial; that about April 26, 1898, said Burt was, pursuant to said conviction, sentenced by said court to be hanged; and that on May 27, 1898, pursuant to said sentence, he was hanged by the sheriff of Travis county, Texas. (Trans., pp. 3, 4.)

The eighth paragraph alleges that, notwithstanding said conviction and sentence, said William E. Burt did not in fact commit

said murder, nor participate therein, but that, if he did, his policy was not avoided thereby, because he was insane. (Trans., p. 4.)

The ninth paragraph avers due payment of premiums, except that due July 30, 1897, and legal tender of that. (Trans., p. 4.)

The tenth paragraph avers due notice and proof of death of insured by plaintiffs to the company and demand for the insurance money. (Trans., p. 5.)

The eleventh paragraph avers expiration of the period of sixty days, fixed by the policy, after receipt by the company of notice and proof of death, for payment of the policy, and that the money became due August 28, 1898; also due demand for payment and company's refusal to pay. (Trans., p. 5.)

The twelfth paragraph avers the liability under the Texas statute of the company for failure, after maturity and demand, to pay the amount due, to pay to plaintiffs twelve per cent thereof, or six hundred dollars, additional, as damages and further their reasonable attorney's fees, which they place at $2,500, because they have been forced to employ attorneys at law and counsel and take legal proceedings for collection. (Trans., p. 5.)

Prayer accordingly for judgment for debt, interest, damages, attorney's fees and general relief. (Trans., pp. 5 and 6.)

To this petition, as part thereof, was attached the following:

EXHIBIT A.

The Union Central Life Insurance Company. No. 133,671. $5000 (amount). $114.70 (premium). Age 26.

In consideration of the statements made in the application for this policy, which application is hereby made a part of this contract, and of the annual payment of the sum of one hundred fourteen and 70-100 dollars, at the home office of the company, on or before the 30th day of July, at noon, in every year, during the term of twenty years from date hereof, and of the payment when due of any and all notes given for premiums, or parts of same, does insure the life of William E. Burt (the insured), of Austin, in the county of Travis, in the State of Texas, in the amount of Five Thousand Dollars, without participation in profits, for the term of his natural life. Upon the death of the insured the company agrees to pay, at its home office, said amount of in-

surance to Anna M. Burt, his wife, if living, otherwise to the executors, administrators or assigns of the insured, within sixty days after the receipt of notice and satisfactory proof of death, the balance of the year's premium, with any and all other indebtedness to the company, being first deducted. This policy is issued and accepted subject to the benefits, provisions and conditions contained in the second page hereof, which are made a part of this contract, which contract shall be held and construed to have been made in the city of Cincinnati, Ohio.

After three years premiums shall have been paid on this policy, except in case of failure to pay at maturity a note given for premium or for a loan upon the security of this policy, the company will, upon legal surrender of this contract, before default of the payment of any premium, issue a paid-up, non-participating policy, payable as herein provided for the amount as named in Table A, on the following page.

In case of default in the payment of any premium after the third, except in case of failure to pay at maturity a note given for premium, or for loan upon the security of this policy, no surrender for a paid up policy having been made, as aforesaid, this policy will be continued in force only as a paid up, non-participating term policy, for such time only as named in Table C, on the following page. If the death of the insured occurs, while the aforesaid term policy is in force, there shall be deducted from the amount insured a sum equal to the regular annual premiums, with interest that would have accrued had this policy been kept in force, said deduction not to exceed three regular premiums with interest.

Upon legal surrender of this policy, on the 30th day of July, A. D. 1915, the company will pay in cash its entire reserved value, according to the Actuaries' Table of Mortality, with 4 per cent. interest, towit: The sum of $2194, provided this policy shall not have been terminated previously by lapse, death or otherwise.

In witness whereof, the Union Central Life Insurance Company by its President and Secretary, signs this contract, at Cincinnati, Ohio, this 1st day of August, 1895.

JOHN M. PATTISON, President.

(Seal) E. P. MARSHALL, Secretary.

(Trans., pp. 6, 7.)

## CONDITIONS.

First.—The failure to pay, if living, any of the first three annual premiums, or the failure to pay any notes, or interest upon notes, given to the company for any premium, on or before the days upon which they become due, shall avoid and nullify this policy without action on the part of the company or notice to the insured or beneficiary; and all payments made upon this policy shall be deemed earned as premiums during its currency. Any and all notes, with their conditions, which may be given for premiums or loans upon the security of this policy, are hereby made a part of this contract of insurance.

Second—No suit to recover on this policy shall be brought after one year from the death of the insured.

Third—If the insured should, without the written consent of the company, at any time enter the military or naval service, the militia excepted, or become employed in a liquor saloon, or if the insured should die by self-destruction, whether sane or insane, within three years from date hereof, this policy shall be null and void, and, in case of said avoidance, the reserve value only, according to the Actuaries' Table of Mortality, with 4 per cent. interest, shall be paid on the surrender of this policy.

Except as hereinbefore provided, this policy shall be incontestable from any cause except misstatement of age. In case the age of the insured shall have been misstated, the amount payable hereunder shall be such portion of the sum insured as the premium paid bears to the required premium at the correct age of the insured. (Trans., p. 7.)

## NOTICE TO POLICY HOLDER.

All payments due on this policy for premiums, or notes, or interest upon notes given to the company, are payable at the office of the company in the city of Cincinnati, or to the authorized agent of the company, on the production of the premium receipt (signed by the President or Secretary), or the note given in payment of the premium.

The contract of insurance between the parties hereto is completely set forth in this policy and the application for the same, and none of its terms can be modified, nor any forfeiture under

it waived, save by an agreement in writing signed by the President or Secretary of the company, whose authority for this purpose shall not be delegated.

Should this policy be assigned or held as security, a duplicate of said assignment must be filed with the company, and due proofs of interest produced with proofs of death. This company does not guarantee the validity of any assignment. (Trans., pp. 7 and 8.)

On said 7th day of July, 1899, respondent, defendant in said Circuit Court, filed therein in said cause a general and special demurrer, special exception, a plea of the general issue and a special plea. (Defendant's first amended original answer, Trans., pp. 8-11.) As the case was disposed of on demurrer and exceptions, these only need be noticed.

The demurrers consisted of: (Trans., p. 8.)

First—A general demurrer.

Second—A special demurrer that first amended original petition of plaintiffs was insufficient in law to state a cause of action against defendant for the reason that it appeared therefrom that the insured died at the hands of the law, under judgment of a court of competent jurisdiction; and.

Third—A special exception that so much of the first amended original petition of plaintiffs as sought recovery of attorney's fees and twelve per cent. of amount of policy, as damages, stated no valid cause of action against defendant, because the law of Texas, towit: Article 3071, of the Revised Civil Statutes of the State of Texas, under which said claims were asserted, was in contravention of the fourteenth amendment of the Constitution of the United States and therefore void.

On the trial of said cause in said Circuit Court, July 10, 1899, the court sustained all the general and special demurrers and exceptions, holding, in effect, as to the general and special demurrers (see bill of exceptions filed by plaintiffs, Trans., pp. 15, 16), that the first amended original petition was insufficient in law and showed no cause of action against defendant, because it appeared therefrom that the assured died at the hands of the law, having

been indicted, tried, convicted and sentenced to death in a court of competent jurisdiction, of murder in the first degree, in spite of his plea (amongst others) of insanity, and pursuant to such sentence executed, notwithstanding it also appeared from said petition that assured did not commit said offense, and that, whether he did, or not, he was at the time insane, unconscious of his acts, and wholly irresponsible therefor, the court being of the opinion that, assured's sanity having been in issue in said criminal case, his conviction, sentence and execution were conclusive as against the right of plaintiffs to recover in said suit in said Circuit Court on the policy of insurance on his life in controversy therein, whether he, in fact, committed or participated in the crime or not, or whether he was insane or not, when it was committed. The court also held, as to the special exception to that part of the petition claiming attorney's fees and damages, that there was no cause of action therefor, because the Texas State statute referred to under which such claim was made, was void as in contravention of the fourteenth amendment of the Constitution of the United States. (Trans., pp. 15, 16.)

These rulings disposed of the case, and plaintiffs, declining to amend, a judgment was rendered by said Circuit Court, July 1st, 1899 (Trans., pp. 11, 12), sustaining said demurrers and exceptions, dismissing the case, adjudging that plaintiffs take nothing by their suit, and that defendant go thence without day and recover its costs.

Plaintiffs duly excepted to this action of the Circuit Court, as is shown by entry in said judgment (Trans., p. 12), and also by their bill of exceptions, duly reserved, allowed and approved, to said ruling and judgment (Trans., pp. 12-13), and assigned errors in said Circuit Court (Trans., pp. 13, 14) as follows:

FIRST ASSIGNMENT OF ERROR.

That the Honorable the Circuit Court of the United States for the Western District of Texas, at Austin, Fifth Judicial Circuit, erred in sustaining the demurrer interposed by the defendant to the first amended original petition of plaintiffs, filed in said cause on the 5th day of July, A. D. 1899, and by holding and deciding that the facts stated in the said amended original petition are not

sufficient to constitute or show a cause of action in said plaintiffs favor against said defendant. (Trans., p. 13.)

SECOND ASSIGNMENT OF ERROR.

That said Circuit Court erred in sustaining the first ground of demurrer interposed by defendant to the first amended original petition of plaintiffs, filed July 7, A. D. 1899, and by holding, deciding and adjudging that said amended original petition does not state facts sufficient to constitute a cause of action in favor of plaintiffs against defendant, because it appears from said petition that William E. Burt, the assured in the policy of life insurance, sued on, was indicted, tried, convicted and sentenced to death, in a court of competent jurisdiction, of the offense of murder in the first degree, and was executed in pursuance of such sentence, although it was also alleged in said petition that, notwithstanding such sentence and execution, said insured did not, in fact, commit, cause, or participate in said murder, but was, at the time of its commission, and whether he committed or participated in it or not, insane, unconscious of the nature of his actions, if any, and wholly irresponsible therefor, said Circuit Court holding and deciding that the defence, amongst others, of insured's insanity having been in issue in said criminal cause, said conviction, sentence and execution of insured were conclusive as against plaintiffs' right to recover on the policy of insurance on his life, in controversy herein, whether insured in fact committed or participated in said crime or not, and whether he was insane or not when it was committed. (Trans., p. 13.)

THIRD ASSIGNMENT OR ERROR.

The said Circuit Court erred in sustaining the second ground of demurrer and special exception interposed by defendant to plaintiffs' said amended original petition, filed as aforesaid, in said cause, and by holding, deciding and adjudging that said amended original petition, in so far as it seeks a recovery by plaintiffs against defendant, of the sum of twelve per cent. on the amount of the policy of the life insurance sued on, as damages, and a recovery of attorney's fees, is insufficient in law to constitute a valid cause of action in favor of plaintiffs against defendant, in that

behalf, because the statute, or law, of the State of Texas, towit: Article 3071 of the Revised Civil Statutes of the State of Texas, under and in virtue of which said two claims are asserted, is violative and in contravention of the fourteenth amendment to the Constitution of the United States. (Trans., p. 14.)

FOURTH ASSIGNMENT OF ERROR.

That said Circuit Court erred in rendering judgment against plaintiffs in said cause, sustaining said demurrers and exceptions, and dismissing plaintiffs' suit upon the pleadings in said cause, and that said judgment is contrary to law and the facts as stated in said pleadings in said cause. (Trans., p. 14.)

On the said 10th day of July, 1899, petitioners filed in said Circuit Court of the United States for the Western District of Texas, their petition for writ of error in said cause from the United States Circuit Court of Appeals for the Fifth Circuit to said Circuit Court, and said petition was granted same day (Trans., p. 12). Thereupon they filed their writ of error bond and same was approved same day, July 10, 1899. (Trans., pp. 14, 15.)

Petitioners had, previously, on same day, filed their bills of exception to the rulings of said Circuit Court in sustaining defendant's general demurrer and exceptions to their said amended original petition, and also to its judgment in favor of defendant in said cause (Trans., pp. 15, 16) and same was approved by said court same day (Trans., p. 17). The stipulation, heretofore adverted to, prescribing what should constitute the record on error in said Circuit Court of Appeals, was made and filed also on July 10, 1899 (Trans., p. 18), and same day, writ of error issued, as petitioners had prayed, from the said Circuit Court of Appeals to said Circuit Court, defendant waiving issue of said writ and accepting service thereof. (Trans., pp. 17, 18.)

The record of said cause, as agreed, having been duly filed in said Circuit Court of Appeals by petitioners, said cause was duly submitted to said court, at its November term 1899, on the 25th day of April, 1900, on briefs and argument of counsel for both parties. (Trans., p. 19.)

Thereafter, at the November term A. D. 1900, of said Circuit

Court of Appeals, on the 4th day of December, 1900, a judgment was rendered by said court in said cause in all things affirming the aforesaid judgment of said Circuit Court therein, and adjudging that petitioners and the sureties on their writ of error bond therein, George W. Littlefield and William R. Hamby, pay all costs of said Circuit Court of Appeals in said cause. (Trans., pp. 19, 20.)

A petition for rehearing, duly certified by counsel, was filed by petitioners in said Circuit Court of Appeals, in said cause. (Trans., pp. 20, 21) and was by said court denied (Trans., p. 21), on the 15th day of January, 1900. This petition was as follows:

PETITION FOR REHEARING BY PLAINTIFFS IN ERROR.

To the Honorable, the United States Circuit Court of Appeals, for the Fifth Circuit:

Your petitioners, plaintiffs in error in the above numbered and entitled cause, having carefully examined the opinion therein of this Honorable Court, think, and respectfully submit, that, with propriety, they may ask the court to consider whether this case be not one in which it will be proper to grant a rehearing to plaintiffs in error, on the following grounds, on which it is respectfully submitted that this court was in error in said opinion, towit:

First—That, while a contract of life insurance in terms payable, notwithstanding the death of the assured at the hands of the law, as the result of capital conviction in the established courts of competent jurisdiction, in event such conviction should be unjust or unwarranted by the evidence, might and probably would be void, as being against public policy, the mere fact of the death of assured at the hands of the law as the result of such capital conviction, if he were in fact innocent (that is, either did not commit the crime or was insane when it was committed), would not avoid a contract of insurance otherwise valid.

Second—That the judgment and sentence to death of assured in a court of competent jurisdiction was admissible only because pleaded by plaintiffs in error, and even then could only establish the fact of its own rendition, and was neither admissible nor con-

clusive to establish the facts on which it was rendered, nor any of such facts, nor was it an adjudication of such matters as to be within any of the rules relating to *res adjudicata*.

Third—That liability of defendant in error on the policy of life insurance in controversy, same being originally a valid contract, could only be avoided by some *subsequent* act of the assured operating a *forfeiture*, and to effect such *forfeiture* assured must either have done some act expressly or impliedly forbidden, or omitted some duty expressly or impliedly required, by the contract. There is no omission of duty involved, and his sentence and death at the hands of the law furnished no such act, if in fact he was either innocent or insane at the time of the commission of the act for which he was convicted and executed.

Finally, plaintiffs in error respectfully suggest that this court again consider the points taken in their brief filed herein to the effect that, the policy of insurance in controversy being silent thereon, the death of the assured William E. Burt at the hands of the law as the result of the judgment and sentence of death pronounced upon him by the District Court of Travis county, Texas, did not and could not preclude a recovery on said policy by plaintiffs in error, if in fact said Burt was either innocent of the crime for which he was convicted or insane at the time of its commission, if he did actually commit it.

Wherefore, upon the foregoing grounds, these plaintiffs in error respectfully pray this Honorable Court to grant them a rehearing of said case.

GARDNER RUGGLES,

Attorney and Counsel for Plaintiffs in Error, S. M. and H. R. Burt.

I, Gardner Ruggles, attorney and counsel for the plaintiffs in error herein, S. M. and H. R. Burt, do hereby certify that, in my judgment, the foregoing petition for a rehearing is well founded, and that the same is not interposed for delay.

GARDNER RUGGLES.

Austin, Texas, December 21, 1900.

Petitioners thereupon applied to this court for a writ of *certiorari* to said United States Circuit Court of Appeals for the Fifth Circuit to bring up the record and proceedings in said cause in said Circuit Court of Appeals to this court for revisal or reversal, and this application was granted by this court and said writ issued April 23, 1901. (Trans., pp. 29, 30.)

II.

BRIEF AND ARGUMENT.

In said Circuit Court of Appeals as well as in said Circuit Court petitioners stated that in the case were but two questions. The first arising under their first and second assignments of error and the second under their third assignment. These two questions they again present here:

First—If insured, William E. Burt, was, in fact, neither guilty of, nor a participant in, but wholly innocent of, the crime for which he died at the hands of the law, or, if, notwithstanding the fact of his commission of, or participation in, the act (if it be true that he did commit or participate in it), he was insane and wholly irresponsible for his acts, when it was committed, was the policy of insurance on his life (in controversy) and his contract thereunder with the defendant company either avoided or forfeited by such death? and

Second—Can plaintiffs, if they can recover at all on the policy, claim also, in addition to the sum named in the policy, twelve per cent. damages on such amount, together with all reasonable attorney's fees for the prosecution and collection of their claim, in virtue of the statute of the State of Texas authorizing such additional demand against any life or health insurance company, liable for a loss on a policy, and failing to pay same within the time specified in the policy after demand made therefor, suit for collection being necessary?

The decision of this last question by said Circuit Court of Appeals became, and its decision by this court can become, necessary, of course, only in event that the first question had been by said Circuit Court of Appeals, or is by this court, resolved in the negative.

1.

In both the trial court and the Circuit Court of Appeals, petitioners summarized their position on the first question, and again state it here, as follows:

First—The policy being silent as to the effect of death of insured at the hands of the law, the only reason why such death could be held, on grounds of public policy, to avoid it, or work a forfeiture of rights against the company thereunder, would be that assured had by his own affirmative action broken his contract with the company, that is, had brought about or hastened his own death, instead of awaiting the probable natural period of his life, according to the tables of mortality, with reference to which alone he and the company had contracted.

Second—Although he was tried, convicted and sentenced by a court of competent jurisdiction, and executed for the murder of his wife, the beneficiary named in the policy, nevertheless, if he was really innocent of the crime, but merely the victim of miscarriage of justice, there was no such affirmative act on his part, and no principle of public policy could be invoked against recovery on the policy of insurance on his life.

Third—If in fact he killed his wife, still, if at the time he did it, he was insane and wholly irresponsible for his acts, his situation would be the same as if he had neither killed his wife nor had any knowledge of, or connection with, her murder.

Fourth—The judgment and sentence of death, pronounced against him by the Criminal Court for murder, and his execution pursuant thereto, if admissible in evidence at all, proved nothing more than the rendition of such judgment and the fact of such execution, and were therefore immaterial in this case.

Fifth—The judgment and sentence against insured by the Criminal Court were inadmissible in evidence in this cause, as being rendered in a different suit between different parties, and on a different subject matter.

Sixth—That the insanity of insured was in issue in the criminal case is immaterial in this.

Seventh—The judgment and sentence of insured in the crim-

inal court, and his execution in accordance therewith, if admissible and material in this case, are prima facie evidence only, and in no manner conclusive as against the claim of plaintiffs herein.

Upon these points, petitioners submitted to said Circuit Court and said Circuit Court of Appeals, and now submit to this court, seven propositions, each with a citation of authorities, which they conceive to be in support thereof, as follows:

## FIRST PROPOSITION UNDER THESE POINTS.

The only implied understanding, or agreement, between assured and the company (the policy being silent as to the death of assured at the hands of the law) was that the assured should not intentionally, or voluntarily, while of sound mind, vary the risk insured against by commission of crime, which effected such death.

## AUTHORITIES.

Amicable, etc., Soc. v. Bolland (Fauntleroy's case), 4 Bligh, N. R., 194.

Ritter v. N. Y. Mut. Ins. Co., 169 U. S., 139.

Bigelow v. Berkshire, etc., Co., 93 U. S., 284.

Terry v. Ins. Co., 4 Dill. (U. S. Cir. Ct., 8th Cir.), 103.

Ins. Co. v. Terry (Id), 15 Wallace, 580.

Mutual, etc., Co. v. Armstrong, 117 U. S., 600.

Dean v. Am. Life Ins. Co., 4 Allen (Mass.), 96.

Breasted v. Farmers' Loan, etc., Co., 4 Hill (N. Y.), 73.

Same case, 8 N. Y. Rep., 279.

Supreme Commandery, etc., v. Armstrong, 74 Alabama, 136.

Clift v. Schwabe, 3 Manning, Granger & Scott, 436-66.

Hatch v. Mutual, etc., Co., 120 Mass., 550.

1 May on Insurance, Secs. 308 et seq.

## SECOND PROPOSITION.

Although assured died at the hands of the law, nevertheless, if he was innocent, in fact, of the act for which he suffered, there was no such voluntary or intentional variation of the risk on his part, or violation of any covenant or agreement.

AUTHORITIES.

Breasted v. Farmers' Loan, Etc., Co., 8 N. Y. Rep., 279; as well as all authorities supra, and also

Bliss on Life Insurance, Secs. 223 et seq.

2 Biddle on Insurance, Secs. 837 et seq.

2 Black on Insurance, Secs. 910 et seq.

1 May on Insurance, Secs. 326 et seq.; and Sec. 310-(8).

Phillips v. Louis Eq., Etc., Co., 26 La. Ann., 404.

Connecticut, Etc., Co. v. Groom, 86 Penn. St., 92; 27 Am. Rep., 689.

Shultz v. Ins. Co., 40 Ohio State, 217; 48 Am. Rep., 676.

Connecticut, Etc., Co. v. Akens, 150 U. S., 468.

Robertson v. French, 14 Eng. Ruling Cases (Campbell), pp. 13 and 23.

Joyce on Insurance, Secs. 2606 et seq.

THIRD PROPOSITION.

Although he died at the hands of the law, and actually killed his wife (the act for which he suffered), yet, if he was, in fact, insane, and wholly irresponsible for his acts, at the time he killed her, there was, still, no such voluntary or intentional variation of the risk, or violation of the contract on his part, as avoided or forfeited the policy, and his situation was the same as if he had been wholly innocent of the act.

AUTHORITIES.

All authorities supra, and

Manhattan, Etc., Co. v. Broughton, 109 U. S., 121.

Accident Insurance Co. v. Crandall, 120 U. S., 527, 531-4.

Life Ins. Co. v. Terry, 15 Wallace, 586.

Horn v. The Anglo-Australian, Etc., Co., 7 Jurist N. S., 673.

Hartman v. Keystone, Etc., Co., 21 Penn. St., 466.

Phadenhauer v. Germania, Etc., Co., 7 Heisk (Tenn.), 567.

DeGogorza v. Knickerbocker, Etc., Co., 65 N. Y., 232.

1 May on Insurance, Secs. 320 et seq.

Bliss on Life Insurance, Secs. 225-38.

Van Zandt v. Mut., Etc., Co., 1 Bigelow's Life, etc., Insurance Reports, 138.

Cranston v. Comm. Ins. Co., Id., 169.
Moore v. Comm. Ins. Co., Id., 138.
Dormay v. Borradaile, 3 Id., 57.
Stormont v. Waterloo, Etc., Co., Id., 196.
Fowler v. Mut. Ins. Co., Id., 673.
Gay v. Union, Etc., Co., 2 Id., 4.
Easterbrook v. Union Etc., Co., 1 Id., 139 (Id., 54 Maine, 224; 89 Am. Dec., 743).
St. Louis, Etc., Co. v. Graves, Id., 736.

FOURTH PROPOSITION.

The judgment and sentence of the Criminal Court against assured were inadmissible in evidence herein.

AUTHORITIES.

Cluff v. Mut. Ben., Etc., Co., 99 Mass., 317.
Cattingham v. Weeks, 54 Ga., 275.
Chiff v. Ins. Co., 99 Mass., 317.
Black on Judgments, Secs. 535, 540, 548, 549, 610.
Teal v. Terrell, 18 Texas, 508-9.
McCamant v. Roberts, 66 Texas, 263.
Mutual Ben., Etc., Co. v. Tisdale, 91 U. S., 238.
Duchess of Kingston's case, 3 Smith's Lead. case, 1998.

FIFTH PROPOSITION.

That the fact that assured's insanity was in issue in the criminal case was immaterial and irrelevant.

AUTHORITIES.

See authorities cited under sixth and seventh propositions, *infra*, as well as under fourth proposition, *supra*.

SIXTH PROPOSITION.

The judgment and sentence of the Criminal Court against assured, and his execution pursuant thereto, it admissible, could prove nothing more than the rendition of such judgment and sentence, and the fact of such execution.

## AUTHORITIES.

Greenleaf on Evidence (Lewis' Edition), Sec. 537, and authorities there cited.

Id., Sec. 538.

Mead v. Boston, 3 Cush. (Mass.), 404.

Cluff v. Mut. Ben. Co., 99 Mass., 317.

Freeman on Judgments, Sec. 319.

## SEVENTH PROPOSITION.

If said judgment, sentence and execution were admissible and material, they were prima facie evidence only, and in no manner conclusive as against the claims of plaintiffs herein.

## AUTHORITIES.

Freeman on Judgments, Sec. 319.

Bigelow on Estoppel, pp. 115 et seq.

Greenleaf on Evidence, Secs. 537 et seq.

It will, of course, be claimed here, as it was claimed in both the lower courts, on the part of respondent:

(a) That the judgment and sentence in the District Court of Travis county, Texas, against assured, William E. Burt, in the murder case, was conclusive of his guilt as against the beneficiaries in his life insurance policy in this case.

(b) That, if the policy had contained an expressed condition that payment should be made by the company, notwithstanding the death of assured at the hands of the law, provided he was in fact innocent of the crime for which he was convicted and executed, or, insane and wholly irresponsible at the time of its commission, if he did commit it, such condition would be void as being against public policy, and that, therefore, the policy being silent on the subject, if he were convicted of the crime, as he was, and executed for it, his beneficiaries could not recover on his policy of life insurance, notwithstanding his actual innocence of the crime for which he suffered, or his actual incapacity to commit it.

Petitioners, however, insist here, as they contended in both of said lower courts, that, notwithstanding the fact that assured died at the hands of the law as a result of his having been indicted, tried, convicted, and sentenced to death for murder, in and by a court of competent jurisdiction, of such offense, and the execution of such sentence, nevertheless, if insured did not in fact commit, cause or participate in, the murder for which he was so sentenced and suffered, but was wholly innocent thereof, or was, at the time of its commission, even if he in fact committed the act, insane, unconscious of the nature of his act, and wholly irresponsible, petitioners were entitled to recover upon the policy of insurance on his life, although assured's insanity had already been in issue and passed on adversely to him, in said criminal proceeding, because,

(a) The only implied understanding, or agreement, between assured and the company (the policy being silent as to the death of assured at the hands of the law) was that assured should not intentionally, or voluntarily, while of sound mind, vary the risk insured against by commission of crime, liable to effect his death.

(b) Although assured died at the hands of the law, nevertheless if in fact he was innocent of the act for which he suffered, there was no such voluntary or intentional variation of the risk on his part, or violation of any of his covenants or agreements, express or implied.

(c) Although assured died at the hands of the law, and actually killed his wife (the act for which he suffered), yet, if he was, in fact, insane and wholly irresponsible for his acts, at the time he killed her, there was still no such voluntary or intentional variation of the risk, or violation of the contract, on his part, as avoided or forfeited the policy of insurance, and his situation was the same as if in fact he had been wholly innocent of the act.

(d) The judgment and sentence of death of the Criminal Court against assured (for, amongst other reasons, want of mutuality as being *res inter alios acta*), and his execution pursuant thereto, were inadmissible in evidence in this suit, except for the fact that they were pleaded by petitioners, and being only so admissible, were evidence merely of the facts of the rendition of the judgment

and the execution of the sentence; were not evidence of any facts on which such judgment was based; were immaterial and irrelevant as to any issue herein, and, at most, were only *prima facie*, and in no manner conclusive of petitioners' right to recover on the policy.

(c) The fact that assured's insanity was in issue and passed on adversely to him in the criminal case was wholly immaterial, in any point of view, in this case.

The trial court, by its said judgment of July 10, 1899, sustaining said company's general demurrer and first exception in effect held and decided that, since it appeared from petitioners' amended petition that said assured William E. Burt was indicted, tried, convicted, and sentenced to death in a court of competent jurisdiction for the offense of murder in the first degree, and was executed pursuant to such sentence, although it likewise appeared that, notwithstanding such sentence and execution, said assured was innocent of the crime for which he suffered, either because he did not participate in it, or because at the time of its commission he was insane and wholly unconscious of and irresponsible for his acts, nevertheless assured's insanity having been, amongst other things, in issue as a defense in said criminal cause, such conviction, sentence, and execution were conclusive as against petitioners' right to recover on the policy of insurance on assured's life in controversy. In other words, that, assured, having a policy of insurance on his life, and being convicted of and executed for a crime which he did not commit, the mere fact of such conviction and execution *ipso facto* and instantly avoided the policy, and the judgment and sentence were not merely evidence of their own rendition, but also evidence and conclusive evidence herein of the facts upon which they were rendered.

The Circuit Court of Appeals in its opinion (Trans., pp. 21-25), McCormick, judge, dissenting (Trans., pp. 25-28), decided the same thing, basing its decision on the point involving assured's conviction and execution, on the supposed authority, or rather on what petitioners respectfully submit was a misapprehension, or, at least, a strained construction of, the case of The Amicable

Society v. Bolland (4 Bligh. N. R., 191, 211), better known as Fauntleroy's case, which will be given hereafter in full. This case was no more than this:

"Fauntleroy, having a policy of insurance on his life, was tried, convicted, and sentenced on October 30, 1824, and on November 30, 1824, was executed, for forgery, then a capital crime in England. On the day prior to his conviction he was duly adjudged a bankrupt and all his effects, including his insurance policy, duly assigned to appellees, Bolland et al., who sued on the policy and recovered at *nisi prius*. The entire facts were agreed on; there was no pretense but what Fauntleroy was justly and legally convicted, and, indeed, it was expressly agreed in the stipulation as to the facts on which the case was tried, that 'a copy of the record of the indictment and conviction should be read and given in evidence on the hearing of the case, without further proof,' and that Fauntleroy, the assured in the policy sued on, was the same person so indicted, convicted and executed. From the judgment in favor of Fauntleroy's trustees in bankruptcy the insurance association appealed and, delivering the opinion reversing the judgment, Lord Chancellor Lyndhurst, after stating the facts as above, said:

"The question under these circumstances is this: Whether the assignees can recover against the insurance company the amount of this insurance; that is to say, whether a party, effecting with an insurance company an insurance upon his life, and afterwards committing a capital felony, being tried, convicted and finally executed, whether, under such circumstances, the parties representing him and claiming under him, can recover the sum insured in the policy so effected." * * * "It appears to me that this resolves itself into a very plain and simple consideration. Suppose that in the policy itself this risk had been insured against; that is, that the party insuring had agreed to pay a sum of money, year by year, upon condition that, in the event of his committing a capital felony, and being tried, convicted, and executed for that felony, his assignees shall receive a certain sum of money, is it

possible that such a contract could be sustained? Is it not void upon the plainest principles of public policy? Would not such a contract (if available) take away one of those restraints operating on the minds of men against the commission of crime—namely, the interest we have in the welfare and prosperity of our connexions? Now, if a policy of that description, with such a form of condition inserted in it in express terms, cannot, on the grounds of public policy, be sustained, how is it to be contended that in a policy expressed in such terms as the present, and after the events which have happened, we can sustain such a claim? Can we, considering the policy, give to it the effect of that construction, which, if expressed in terms, would have rendered the policy, as far as that condition went at least, altogether void? Upon this short and plain ground, therefore" * * * "I think that this policy cannot be sustained, and that the respondents are not entitled to recover."

This Honorable Court, in the case of Ritter v. The Mutual Life Insurance Company of New York (169 U. S., 139), cited with approval the Fauntleroy case as assertive of the doctrine only that where the death of an assured is brought about by his own wilful, deliberate act, when in sound mind, there can be no recovery on the policy, observing that "death, the risk of life insurance, the event upon which the insurance money is payable, is certain of occurrence; the uncertainty of the time of its occurrence is the material element and consideration of the contract. It can not be in contemplation of the parties that the assured, by his own criminal act, shall deprive the contract of its material element; shall vary and enlarge the risk and hasten the day of payment of the insurance money."

This decision was also called to the attention of said Circuit Court of Appeals, but that court, notwithstanding, applied the Fauntleroy case in this wise: It laid it down as a principle that, if an express condition were inserted in a policy of life insurance to the effect that it should be payable, notwithstanding the death of the insured at the hands of the law, provided he were either in fact innocent of, or insane at the time of commission of, the

offense for which he suffered, such provision would be void, as against public policy, and then held "that, if a policy with such a form of condition inserted in it in express terms cannot on grounds of public policy be sustained, a policy without such a condition cannot be enforced, on the averment of facts which, if embraced in the written contract, would have made the policy to that extent void."

This is certainly not supported by either the Fauntleroy or the Ritter case, and, if it be conceded, for the sake of argument, that the expression of such a condition would preclude recovery on the policy, it by no means follows that, if an innocent person is executed by judicial mistake, a recovery on his policy of life insurance would thereby be precluded.

If recovery in such case is precluded at all, it must be by force of the judgment of conviction, and the only authority, in this court, at least, tending to this effect is the case of Coffey v. The United States (116 U. S., 436), cited by said Circuit Court of Appeals. But what was actually decided in that case was that, Coffey having been acquitted in a criminal case against him for a revenue offense, the judgment of acquittal was conclusive in a *qui tam* action against him for a penalty denounced against the same offense, because the punishment criminally and the penalty civilly (if it may be so termed), were both parts of the entire punishment denounced against the offense, and besides both the parties and the issues in the two cases were identical.

This disposes of the first question, but petitioners pray leave to reproduce, as appendices to this brief, their argument on this question submitted to said Circuit Court of Appeals; their argument submitted to this court in support of their petition for writ of certiorari herein; the opinion herein of said Circuit Court of Appeals for the Fifth Circuit and the dissenting opinion of McCormick, Circuit Judge (Trans., pp. 25-28), which will be found hereafter, marked, respectively, appendices A, B, C and D. Of these appendices, those marked A and B will be found also to discuss the only remaining question in the case, as aforestated, which is, restated.

2.

Can plaintiffs in error, if they can recover at all on the policy, claim also, in addition to the sum named in the policy, twelve per cent. damages on such amount, together with all reasonable attorney's fees for the prosecution and collection of their claim, in virtue of the statute of the State of Texas authorizing such additional demand against any life or health insurance company, liable for a loss on a policy, and failing to pay same within the time specified in the policy, after demand made therefor?

This statute is substantially as follows:

Article 3071, title LVIII, chapter 3, of the Revised Civil Statutes of Texas (1895). "In all cases where a loss occurs, and the life or health insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, twelve per cent. damages on the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of such loss."

In both the trial court and the Circuit Court of Appeals this question was raised and argued, but, of course, its decision can become necessary only in event the first question above is resolved in favor of petitioners' contention.

However, it becomes necessary, petitioners conceive, to discuss this question here, because their claim is that they are entitled to recover against respondent (1) on the policy of insurance, Five Thousand Dollars, with six per cent. per annum interest, from the date (May 27, 1898) when, if at all, it became payable, and (2) respondent being a life insurance company liable therefor and having failed to pay said policy, within the time specified, and after demand made therefor; also, under said statute, in addition thereto, twelve per cent. damages on said amount as well as all reasonable attorney's fees for the prosecution and collection of such loss, their claim.

While the Circuit Court of Appeals, because probably its disposal of the first question rendered the decision of this, in its

judgment, unnecessary, did not discuss this matter at all, nevertheless that court in all things affirmed the judgment of the Circuit Court, which also sustained the demurrer and exception of respondent to that part of petitioners' petition asserting this claim, and thereby held, in effect, as did said Circuit Court, directly, that such claim was inadmissible, because said statute of Texas was obnoxious to the equality clause of the XIV amendment to the Constitution of the United States.

If this court should hold that petitioners are entitled to recover on the policy, an authoritative decision on this last question would also be necessary in order to have it ascertained, without necessity for another writ of *certiorari*, *what* they are entitled to recover.

The Circuit Court of Appeals scarcely intended, nay, it may be said, in view of its own later decision in the case of the Merchants' Life Association off the United States v. Yoakum (98 Federal Reporter, 251) *did not* intend, to declare said Texas statute unconstitutional, but the Circuit Court did so declare it, and the judgment of the Circuit Court of Appeals, affirming the Circuit Court's judgment, would in effect decide it to be obnoxious to the constitutional provision.

If, therefore, this court should reverse the judgments of both said Circuit Court and said Circuit Court of Appeals on the first question and hold that petitioners are entitled to recover on the policy, it is likely that petitioners will be put to another writ of error, or writ of *certiorari*, or both, to achieve the full measure of their recovery. But, granting that petitioners recover in both courts all they ask, nevertheless, for lack of an authoritative decision of this vexed question, by this tribunal of last resort, respondents may prosecute their writ of error, or petition for writ of certiorari, or both, in order to have that definitely settled, which petitioners submit ought to be settled by this court now.

Petitioners submitted to both said Circuit Court and said Circuit Court of Appeals, and submit to this court now, on this question, the following

## PROPOSITION.

The Statute of Texas, Revised Civil Statutes of Texas (1895), Title LVIII, Chapter 3, Article 3071, providing that:

"In all cases, where a loss occurs, and the life or health insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, twelve per cent. damages on the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of such loss," is not in contravention of, or obnoxious to, the fourteenth amendment to the Constitution of the United States.

They submit now, as they submitted to both lower courts, these

## AUTHORITIES.

Revised Civil Statutes of Texas (1895), Title LVIII, Chapter 3, Article 3071. (Compare Act April 5, 1889, Sayles' Texas Civ. Stats. Supp. p. 768, Art. 4266a).

The Union Central Life Insurance Co. v. Chowning, 86 Texas, 654.

The Fidelity and Casualty Co. of New York v. Allibone, 15 Texas Civil Appeals, 178, and 90 Texas, 660.

The Gulf, Colorado and Santa Fe Ry. Co. v. Ellis, 165 U. S., 150, and cases cited in dissenting opinion of Mr. Justice Gray.

See, also, St. Louis and San Francisco Ry. Co. v. Matthews, 165 U. S., 1.

St. Louis, Iron Mountain and Southern Ry. Co. v. Paul, 173 U. S., 404, and

Atchison, Topeka and Santa Fe Ry. Co. v. Matthews, 174 U. S., 96.

In both the Circuit Court and Circuit Court of Appeals on this point respondent contended, and will here contend, that said statute is obnoxious to the equality clause of the XIV amendment to the Constitution of the United States and argued that, this court (in Gulf, Colorado and Santa Fe Railway Company v. Ellis, 165 U. S., 150) held unconstitutional and void, as in contravention of said amendment, the act of the Legislature of Texas

of April 5, 1889, (Sayles' Texas Civil Statutes, Supplement, p. 768, article 1226a) which, in substance, provided that "any person in the State of Texas having a valid *bona fide* claim for personal services rendered, or labor done, or for damages, or for over charges on freight, or claims for stock killed or injured by the trains of any railway company, provided that such claim for stock killed or injured should be presented to the agent of the company nearest to the point of such killing or injury, against any railway corporation operating a railroad in this State, such claim, not exceeding $50, might present his claim, verified by his affidavit, for payment to such corporation, and, if same should not be paid within thirty days after such presentation, might institute suit thereon in the proper court, and, if he finally established his claim, and obtained judgment for its full amount, should be entitled to recover, in addition to it and costs, also all reasonable attorney's fees, provided he had an attorney employed in his case, not to exceed $10, to be assessed and awarded by the court or jury trying the same, and that, the same principle applying in this case as in that, the statute in controversy must be likewise void.

As against this contention, petitioners argued and claimed, and again insist here, that the Supreme Court of Texas, in Union Central Life Insurance Company v. Chowning, 86 Texas, 654, decided before, and in The Fidelity and Casualty Company of New York v. Allibone, 90 Texas, 660, decided since, the Ellis case, had held this identical statute not obnoxious to said amendment. Also that in the Ellis case itself, this court had held that classification, if based on some reasonable ground—some difference, bearing a just and proper relation to the attempted classification—and not being a mere arbitrary selection of one class of debtors for imposition of additional penalties for non-payment without suit, would not render the statute effecting it obnoxious to the equality clause of the said amendment.

Also that this court, in St. Louis, Iron Mountain and Southern Railway Company v. Paul, 173 U. S., 404, had held that the Arkansas act of 1889, requiring railroad companies to pay their employes when discharged their unpaid wages then earned, without deduction, or that such wages should continue, at the same rate, until paid, not to exceed sixty days, was not violative of said

amendment, and did not deny such companies the equal protection of the laws.

Finally, that this court, in Atchison, Topeka and Santa Fe Railroad Company v. Matthews, 174 U. S. 96, had held that the Kansas statute, providing that in an action against a railroad company for damages by fire caused by operating the railroad, the plaintiff need only establish the fact that the fire complained of was caused by operating the railroad and the amount of his damages, and that such proof should be prima facie evidence of negligence on the part of the railroad, and that the plaintiff, if he recovered, should also be allowed a reasonable attorney's fee, was not in conflict with the fourteenth amendment to the Constitution of the United States, as denying the equal protection of the laws to such company, and was valid, the court observing that the equal protection of the laws guaranteed by said amendment does not forbid classification, nor does the fact of inequality produced by classification determine the unconstitutionality of the statute.

The reasonableness of the classification producing the apparent inequality is, petitioners contend, the true and sole test of the Statutes' constitutionality and as the reasonableness of this particular Statute of Texas has been very thoroughly and ably discussed by McCormick, Circuit Judge, in delivering the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in the case of the Merchants' Life Association of the United States v. Yoakum, reported in 98 Federal Reporter, pp. 251-271, petitioners need say no more on this question than refer to that opinion.

Petitioners, again asking this court to consider, in connection with the foregoing, their arguments contained in appendices A and B, respectfully submit that the two questions which have been discussed, viz:

1. Whether the indictment, trial, conviction, and sentence for a capital crime in a court of competent jurisdiction, and the execution pursuant thereto, of an innocent person who has a policy of insurance on his life, silent as to his death at the hands of the

law, will preclude any recovery by the beneficiaries on the policy. And, if such recovery may be had, then

2. Whether the law of the State of Texas (which has been heretofore set out in extenso in paragraph nineteenth hereof and need not, therefore, be repeated) viz: Article 3071, Title LVIII, Chapter 3, Revised Civil Statutes of Texas, is void as violative of the equality clause of the fourteenth amendment to the Constitution of the United States.

Ought both to be resolved by this court in the negative and that the judgments of both the Circuit Court of the United States for the Western District of Texas, and the United States Circuit Court of Appeals for the Fifth Circuit, in this cause ought to be reversed and the cause remanded, with such directions from this court as will secure them in said Circuit Court a trial of their cause on its merits.

GARDNER RUGGLES,
Of Counsel with Petitioners.

## APPENDIX A.

### PETITIONERS' ARGUMENT SUBMITTED TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

### ARGUMENT.

The precise question as to whether or not, when the policy is silent on the subject, the death of the assured in a policy of life insurance, by judicial sentence for crime, if, in fact, he was wholly innocent and merely the victim of mistake, or miscarriage of justice, of itself avoids the policy has never been directly decided. The only case in which it has been held that avoidance of the policy would result from the death of the assured at the hands of the law for crime is The Amicable Society, Etc., v. Boiland, 4 Bligh N. R., 194, 211, better known as Fauntleroy's case. This case was an action by assignees in bankruptcy to secure the amount due on a policy of insurance stipulating for the payment of a certain sum, upon the death of one Fauntleroy, to his executors, administrators or assigns. Fauntleroy was convicted of forgery (then a capital offense) and executed. The precise question in the suit, by the assignees against the company, on his policy of life insurance, was "whether the assignees as representatives of one who effects insurance on his life, and afterwards commits a capital felony, for which he is tried and executed, could recover the amount named in the policy." The Lord Chancellor (Lord Lyndhurst) delivered the opinion, and, as it is brief, it may be excusable to give it in full. (4 Bligh, N. R., pp. 210-212.)

"The Lord Chancellor. The circumstances of the case are shortly these: In January, 1815, Henry Fauntleroy insured his life with the Amicable Insurance Society. In the month of May in the same year, he committed forgery on the Bank of England. He continued to pay the premiums upon this insurance for a considerable period of time. In the year 1824 he was apprehended,

and on the 29th of October in that year he was declared a bankrupt, and an assignment of his effects was made to the respondents. On the following day, the 30th of October, he was tried for this forgery; he was found guilty, sentenced to death, and in the month of November following was executed.

"The question under these circumstances is this: Whether the assignees can recover against the insurance company the amount of this insurance; that is to say, whether a party, effecting with an insurance company an insurance upon his life, and afterwards committing a capital felony, being tried, convicted, and finally executed, whether under such circumstances, the parties representing him, and claiming under him, can recover the sum insured in the policy so effected. I attended to the argument at the bar, in conjunction with the Noble Lord now present, and we have both come to the conclusion that the assignees cannot maintain this suit.

"It appears to me that this resolves itself into a very plain and simple consideration. Suppose that in the policy itself this risk had been insured against; that is, that the party insuring had agreed to pay a sum of money, year by year, upon condition that, in the event of his committing a capital felony, and being tried, convicted and executed for that felony, his assignees shall receive a certain sum of money, is it possible that such a contract could be sustained? Is it not void upon the plainest principles of public policy? Would not such a contract (if available) take away one of those restraints operating on the minds of men against the commission of crimes—namely, the interest we have in the welfare and prosperity of our connexions? Now, if a policy of that description, with such a form of condition inserted in it in express terms, cannot, on the grounds of public policy, be sustained, how is it to be contended that in a policy expressed in such terms as the present, and after the events which have happened, we can sustain such a claim? Can we, considering the policy, give to it the effect of that insertion, which, if expressed in terms, would have rendered the policy, as far as that condition went, at least, altogether void?

"Upon this short and plain ground, therefore, independently

of the more complicated arguments referred to by the counsel at the bar, in the discussion of the case, I think that this policy can not be sustained, and that the respondents are not entitled to recover. I submit, therefore, that the judgment of the court below ought, under these circumstances, to be reversed.

"Judgment reversed."

The above is the entire opinion. The facts, and all the facts, on which the case resulted in favor of respondents below, were all agreed on (4 Bligh, pp. 203-4) as follows:

"The cause being at issue, it was agreed between the respondents and the appellants that a copy of policy of insurance should be read and given in evidence on the part of the respondents on the hearing of the cause; that the respondents were the assignees of the estate and effects of Henry Fauntleroy in the policy named, under and by virtue of a commission of bankrupt, awarded and issued against Henry Fauntleroy, under which he was duly found and declared bankrupt, and his estate and effects were duly assigned to the respondents, on the 29th day of October, 1824; that Henry Fauntleroy, from the time of making the policy, up to and until the 11th day of January, 1824, or some person on his behalf, regularly paid the premiums as they became due on the policy; that the printed copies of the several charters, letters patent and by-laws of the appellants, the Amicable Society for a Perpetual Assurance Office, should be read and given in evidence on the hearing of this cause, without further proof; that Henry Fauntleroy was convicted of felony on the 30th day of October, 1824, and was executed on the 30th day of November, 1824, in pursuance of such conviction and the judgment of death thereupon pronounced upon him; that a copy of the record of the indictment and conviction should be read and given in evidence on the hearing of the cause, without further proof, and that Henry Fauntleroy named in the indictment and conviction was the Henry Fauntleroy named in the pleadings of the cause, upon whose life the insurance mentioned in the pleadings was effected."

The policy was silent as to the effect of the death of the assured either by suicide or at the hands of the law.

Commenting on this case, Bunyon, in his work on Life Insurance, says:

"It would render those natural affections which make every man desirous of providing for his family, an inducement to crime, for the case may be well supposed of a person insuring his life for that purpose, with the intention of committing suicide. For a policy, moreover, to remain in force, when death arose from any such cause, would be a fraud upon the insurer, for a man's estate would thereby benefit by his own felonious act. Hence the rule of law when there is no condition whatever. But, in that case, if the suicide or self-destruction takes place when the assured is insane and not accountable for his acts, the rule arising from public policy does not apply, and his representatives are entitled to the policy money." (Bunyon, Life Ins., 3d Ed., p. 96.)

The reasoning of both Lord Lyndhurst, in Fauntleroy's case, and of Bunyon, is clearly based on the fact that the death of the assured was brought about by his own voluntary, intentional act; that is, that the assured deliberately shortened his life, or in effect committed a species of suicide, but Lord Lyndhurst does not go so far as to suggest (and the text-writer emphatically denies), that the mere fact of conviction, sentence and execution of assured at the hands of the law, would, the policy being silent, of themselves, conclusively operate an avoidance of the policy, under all circumstances. Lord Lyndhurst could not have so decided (and if he had it would have been no more than a dictum), as it was not necessary in the case before him, the entire evidence on this point being the admission of the respondents (in the agreed case) that Fauntleroy was indicted, tried and convicted of felony and pursuant to such conviction, executed. He did not so decide, for the whole tenor of his reasoning is that it is the conscious affirmative act of the insured in doing something that he knows will bring about his death, followed by his death as its direct consequence, that relieves the insurer of liability. If this be true, how then could the assured be said to have brought about his own death if he were convicted and executed, either for a crime which he did not commit, or for an act done while insane and wholly irresponsible?

The law reads into every policy of life insurance a condition that the assured will not put a period to his own life, but it does not read into it any condition that the policy shall be void, if, without any fault on his part, he dies earlier than he and the insurer thought he would, even by judicial sentence. What has he done to break his contract, if innocent of the act for which he is hanged? What, if from insanity unconscious of its commission or its consequences?

Of course, if the policy in terms provided that it should be void if the assured should die at the hands of the law (a provision that some policies contain, just as this policy contains one rendering it void if assured should die by self-destruction, whether sane or insane), and the assured did so die, it might be that such fact would avoid the policy (the point on which it is believed the decisions in Clift v. Schwabe, and Borradaile v. Hunter, referred to infra, turned), but, if so, it would be for the reason that the liability of the insurer had been made expressly to turn on the mere happening of the event, without reference to its cause, there being no reasons of public policy why it should not have been made to turn on that, as well as on any other contingency. In other words, the insurer having expressly excepted that death from his risk, if the assured died that death, no matter how it was brought about, there might not be any liability.

Such, however, is not this case. In this case, the policy is silent, and if the death of the assured at the hands of the law can be held to have avoided the liability of the insurer, it must be because, and only because, the assured wilfully, deliberately and voluntarily shortened his natural life, with reference to which alone he and the insurer contracted, that is, of his own free will, while of sound mind, committed a crime, the punishment of which was death and followed by death. On no other grounds could reasons of public policy be invoked to avoid the liability of the insurer. Could it be possible to hold that, either if he actually had nothing to do with the commission of the crime, or if he was insane and irresponsible when he committed it, if he did commit it, and he was, nevertheless, hanged for it, his misfortune should operate to release the insurer? And that is precisely what is contended by defendant in error here.

These views have been indorsed by the Supreme Court of the United States, in the case of Ritter v. The Mutual Life Insurance Company of New York, decided in October, 1897 (see 169 U. S., p. 140). That case was one in which the assured having insured his life committed suicide. There was no question about the fact of his having killed himself, but his legal representative, Ritter, contended that it was done while he was insane (the policy being silent on the subject), while the company insisted that it was a deliberate and intentional act committed while assured was in sound mind. The question of assured's sanity was the only fact in issue, and upon it the court below instructed the jury substantially thus: (pp. 145 and 148.)

"If one whose life is insured intentionally kills himself when his reasoning faculties are so far impaired by insanity that he is unable to understand the moral character of his act" (which last expression the court explained), "even if he does understand its physical nature, consequence and effect, such self-destruction will not of itself prevent recovery upon the policies."

The jury found a verdict for the defendant company, upon which judgment in its favor was accordingly rendered.

Mr. Justice Harlan, who delivered the opinion of the Supreme Court, affirming this judgment, after observing (p. 148) that the case was thus placed before the jury on the single issue of the insanity of the assured at the time he committed suicide, with a direction to find for the plaintiff, if assured was then insane, but for defendant if he was then of sound mind; and that assuming that the jury obeyed the instruction of the court, their verdict must be taken as finding that the assured was not insane at the time he took his life, approves the instructions of the court below and says (p. 152):

"If a person should apply for a policy expressly providing that the company should pay the sum named, if or in the event the assured, at any time during the continuance of the contract, committed self-destruction, being of sound mind it is reasonably certain that the application would be instantly rejected. It is impossible to

suppose that an application of that character would be granted. If experience justifies this view, it would follow that a policy stipulating generally for the payment of the sum named in it, upon the death of the assured, should not be interpreted as intended to cover the event of death caused directly and intentionally by self-destruction while the assured was in sound mind, but only death occurring in the ordinary course of his life."

Again, after quoting certain provisions of the policy and asserting their tenor to be that "the parties did not contemplate insurance against death caused by deliberate, intentional self-destruction, when the insured was in sound mind (same page), he says (p. 153):

"These provisions of the contract tend to show that the death referred to in the policy was a death occurring in the ordinary course of the life of the assured, and not by his own violent act designed to bring about that event."

"In the case of fire insurance it is well settled that, although a policy in the usual form, indemnifying against loss by fire, may cover a loss attributable merely to the negligence or carelessness of the insured, unaffected by fraud or design, it will not cover a destruction of the property by the willful act of the assured himself in setting fire to it, not for the purpose of avoiding a peril of a worse kind, but with the intention of simply effecting its destruction. Much more should it be held that it is not contemplated by a policy taken out by the person whose life is insured and stipulating for the payment of a named sum to himself, his executors, administrators or assigns, that the company should be liable, if his death was intentionally caused by himself when in sound mind. When the policy is silent as to suicide, it is to be taken that the subject of the insurance, that is, the life of the assured, shall not be intentionally and directly, with whatever motive, destroyed by him when in sound mind. To hold otherwise is to say that the occurrence of the event, upon the happening of which the company undertook to pay, was intended to be left to his option. That view is against the very essence of the contract."

On page 154 he argues:

"There is another consideration that death intentionally caused by the act of the assured, when in sound mind—the policy being silent as to suicide—is not to be deemed to have been within the contemplation of the parties; that is, that a different view would attribute to them a purpose to make a contract that could not be enforced without injury to the public. A contract, the tendency of which is to endanger the public interests, or injuriously affect the public good, or which is subversive of sound morality, ought never to receive the sanction of a court of justice, or be made the foundation of its judgment.

"If, therefore, a policy—taken out by the person whose life is insured, and in which the sum named is made payable to himself, his executors, administrators or assigns—expressly provided for the payment of the sum stipulated, when, or if, the assured, in sound mind, took his own life, the contract, even if not prohibited by statute, would be held to be against public policy, in that it tempted or encouraged the assured to commit suicide, in order to make provision for those dependent upon him, or to whom he was indebted.

"Is the case any different in principle, if such policy is silent as to suicide, and the event insured against—the death of the assured—is brought about by his willful, deliberate act, when in sound mind."

After a somewhat exhaustive review of authorities (pp. 155-8), in support of the principle just announced, he continues (p. 158):

"Death, the risk of life insurance, the event upon which the insurance money is payable, is certain of occurrence; the uncertainty of the time of its occurrence is the material element and consideration of the contract. It cannot be in the contemplation of the parties that the assured, by his own criminal act, shall deprive the contract of its material element; shall vary and enlarge the risk, and hasten the day of payment of the insurance money."

The learned Justice quotes nearly the whole opinion of Lord Chancellor Lyndhurst, in Fauntleroy's case (supra), and, after ob-

serving that "In support of the general proposition that the law will not enforce contracts and agreements that are against the public good, and therefore are forbidden by public policy," reference is often made to that case, proceeds (p. 158):

"The doctrine asserted in Fauntleroy's case, that death by the hands of public justice, the punishment for the commission of crime, avoids a contract of life insurance, though it is not so expressed in the contract, has not, so far as we have examined, been questioned, though the case itself may have led to the very general introduction of the exception into policies. The same considerations and reasoning which support the doctrine seem to lead, of necessity, to the conclusion that voluntary, criminal, self-destruction, suicide, as defined at common law, should be implied as an exception to the liability of the insurer, or rather, as not within the risks contemplated by the parties, reluctant as the courts may be to introduce by construction, or implication, exceptions into such contracts, which usually contain special exceptions." Again: "The fair and just interpretation of a contract of life insurance, made with assured, is that the risk is of death proceeding from other causes than the voluntary act of the assured, producing or tending to produce it; and that the extinction of life by disease or by accident, not suicide, voluntary and intentional, by the assured, while in his senses, is the risk intended; and it is not intended that, without the hazard of loss, the assured may safely commit suicide."

He concludes (p. 160):

"For the reasons we have stated, it must be held that the death of the assured, William M. Runk, if directly and intentionally caused by himself, when in sound mind, was not a risk intended to be covered, or which could legally have been covered, by the policies in suit."

Plaintiffs in error have quoted thus largely from these two cases, because Fauntleroy's case being (so far as they have been able to find) the only case ever decided as to the effect on an insurance policy of death of an assured by the sentence of the law, they de-

sired to show just what that decision was and upon what reasoning it was founded, and, the Ritter case having been decided, upon the most nearly analogous point that they have seen, upon exactly the same reasoning, and, it may be said, upon the authority of the Fauntleroy case, they deemed it necessary, by giving, as nearly as possible, the language of Mr. Justice Harlan, to establish just how the Supreme Court of the United States seemed to them to understand that case and its effect.

They submit that there cannot be two opinions as to the meaning of the decision in either case, and that, if there had originally been any doubt as to that of the Fauntleroy case, such doubt is entirely removed by the opinion of Mr. Justice Harlan in the Ritter case, the whole of whose reasoning, argument and citation of authorities is to the effect, and to the effect only, that it is the intentional, voluntary death-producing act of the assured, while in sound mind, followed by his consequent death, that releases the insurer of liability; and not that assured dies, even by self-inflicted death, while insane and wholly irresponsible—much less when he is the innocent, or involuntary victim of judicial error, as in the case at bar.

The only authorities submitted by defendant in error, on the argument in the court below so far as now recalled, besides Amicable, Etc., Society v. Bolland (Fauntleroy's case), 4 Bligh, N. R., p. 194, and Ritter v. The Mutual Life Insurance Co. of New York, 169 U. S., 139, were these: Supreme Commandery Knights Golden Rule v. Armstrong, 71 Alabama, 436; Clift v. Schwabe, 3 Man., Gr. and Scott, 436-66 (as reported in Bliss on Life Insurance, p. 368); Mutual Life Insurance Co. of New York v. Armstrong, 117 U. S., 600; and Hatch v. The Mutual Life Insurance Co., 120 Mass., 550.

It may not be amiss to briefly advert to these cases, in order to show just what was decided in each of them.

In Supreme Commandery Knights, Etc. v. Armstrong (71 Ala.), the assured was a member of a fraternal benefit order. His policy contained no condition of the kind, nor did any rule of the order, at time it was issued, prohibit suicide, but for some time prior to his death, a by-law of the order had been in force (and his

policy provided that it was issued subject to all rules, laws, by-laws, etc., of the order then in force or thereafter passed) which provided that the policy should be void, if assured killed himself, whether sane or insane. Assured killed himself, and suit was brought on the policy. Defendant pleaded assured's suicide and the by-law specially. Plaintiff demurred to this plea (1) because the by-law being passed subsequently to issue of policy did not apply, and (2) because plea failed to show that assured wilfully suicided, its only averment being that assured came to his death by taking his own life. The demurrers were sustained by the trial court, and defendant appealed. The Supreme Court of Alabama reversed the judgment and held the plea good, saying that, if the plaintiff intended to excuse assured's act of self-destruction, because of mental unsoundness of assured, when it was committed, he should have pleaded it by way of replication to defendant's plea.

This was all there was of the case, but in discussing it the court cited with approval Fauntleroy's case (citing also Life Ins. Co. v. Terry, 15 Wallace, 586; Horn v. The Anglo-Australian, Etc., Ins. Co., 7 Jurist N. S., 633; Hartman v. Keystone, Etc., Ins. Co., 21 Penn. St., 466; Phadenhauer v. Germania Ins. Co., 7 Heisk, 567; Deciogorza v. Knickerbocker Ins. Co., 65 N. Y., 232; and Biss on Life Insurance, Secs. 225-238), and said, in substance, that a provision of forfeiture in case of assured taking his own life is directed against assured deliberately putting an end to his own existence, or committing any unlawful, malicious act, the consequence of which is his own death, and implies that he must be of years of discretion and in his senses, so that, if assured was not of sound mind, plaintiffs should have set that fact up, the presumption being in favor of assured's sanity." And again, "We are not aware that it has anywhere been expressly decided that voluntary self-destruction by one whose life was insured, and of whose sanity there was no question, would avoid the contract of insurance" (the Ritter case had not then been decided), "or rather, would not fall within its risk, though in that event there was not expressed an exception to the liability of the insurer. The authorities generally seem to proceed upon the tacit or expressed concession, or admission, that such is the law. (Moore v. Wolsey, 4 Ell. & Black, 243.)"

Clift v. Schwabe (3 Mann., Gr. and Scott), was a case in which the policy contained a proviso that it should be void "if assured should commit suicide, or die by duelling, or at the hands of justice." Assured died in consequence of having voluntarily and for the purpose of killing himself, taken sulphuric acid, but under circumstances tending to show that he was, at the time he took the sulphuric acid, of unsound mind. Charging the jury, at nisi prius, Creswell, J., said, that "in order to find the issue for the defendant it was necessary that they (the jury) should be satisfied that assured died by his own voluntary act, being then able to distinguish between right and wrong, and to appreciate the nature and quality of the act that he was doing, so as to be a responsible moral agent; that the burden of proof, as to his dying by his own voluntary act, was on the defendant; but, that being established, the jury must assume that he was of sane mind, and a responsible moral agent, unless the contrary should appear in evidence." The jury having found for plaintiff, a judgment, entered accordingly, was, by bill of exception, brought into the court of Exchequer Chamber which (Chief Baron Pollock and Wightman B., dissenting, and Coleridge, B., absent) reversed the judgment and ordered a new trial, four judges (all the judges delivering separate opinions) holding the above direction erroneous, "for, that the terms of the condition included all sorts of voluntary self-destruction, and, therefore, that, if assured voluntarily killed himself, it was immaterial whether he was, or was not, at the time, a responsible moral agent," the true question which should have been put to the jury according to the opinion of Patterson, B. (p. 466), being "that which was put by Erskine, J., in Borradaile v. Hunter, whether the deceased knew the probable consequences of his act, and did that voluntarily, intending such consequences to follow; and that no question should be put as to the act done being criminal or not." This case, however, it would seem, turned upon the expressed contingency of self-destruction, no matter how brought about, and in this connection the court is respectfully referred to the case of Borradaile v. Hunter, 5 Manning & Granger, 639, and also to Breasted v. The Farmers' Loan and Trust Company, opinion of Nelson, C. J., reported in 4 Hill's New York Reports,

p. 13, as well as to the later opinion, in the same case, by Willard J., reported in 8 New York Reports, p. 299. (See also 1 May on Insurance, Sec. 308, et seq.)

The Mutual Life Insurance Company of New York v. Armstrong, decided by the Supreme Court of the United States (117 U. S.), was a case which may be briefly summarized as follows: Defendant (the company) proved that Hunter (the beneficiary by assignment) murdered the assured. This is the whole case, and the late Mr. Justice Field, in a very terse opinion, said: "Hunter, the assignee of the policy, forfeited all rights under it when, to secure its immediate payment, he murdered the assured." And this short sentence is the very gist of the decision.

Finally, Hatch v. The Mutual Life Insurance Company, was a case decided by the Supreme Court of Massachusetts (120 Mass.), and holds no more than (to quote from the opinion) that "the deceased voluntarily submitted herself to an illegal operation, with intent to cause an abortion, without any justifiable medical reason, and that the operation performed upon her was dangerous to life, and known by her to be so; and that a miscarriage was effected by the operation, from the consequences of which she died. It is, therefore, established that this voluntary act on her part, condemned alike by the laws of nature and the laws of all civilized States, and known by her to be dangerous to life, did actually result in death." For which reason the company was held not liable.

What there is in any of these cases to contradict the contention, in this case, of the plaintiffs in error; or what comfort defendant in error can find in them, if the views of plaintiffs in error, as herein expressed, regarding the Fauntleroy and Ritter cases (supra) be correct, does not readily appear. In fact, plaintiffs in error contend that, if the Fauntleroy and Ritter cases had never been decided, their own position, and not that of the defendant in error, would be abundantly supported by the reasoning of these seven cases just summarized, cited by the latter.

These remarks dispose of the first, second and third propositions, or points offered by plaintiffs in error under their first and second assignments of error, and, indeed, practically dispose of the remaining four. For, conceding, for argument's sake, the admissibility in evidence here of the judgment and sentence of death pronounced against assured by the Criminal Court, and his execution in pursuance thereof, it must follow, from what has been quoted above, that such judgment and sentence and death could be no more than prima facie, and in no manner conclusive as against the claim of plaintiffs in error. That the judgment and sentence could not of themselves be conclusive hardly admits of question, for the text-writers all agree, to quote the language of Mr. Freeman in his work on Judgments, that "the record of a conviction, or of an acquittal, is not, according to a decided preponderance of authority, conclusive of the facts on which it is based in any civil action" (Freeman, Judgments, Sec. 319), and that such judgment and sentence could prove no more than their own rendition, it would seem to be only necessary to quote from Greenleaf that * * * "it is obvious that, as a general rule, a verdict and judgment in a criminal case cannot be given in evidence in a civil action to establish the facts on which it was rendered. If the defendant was convicted it may have been upon the evidence of the very plaintiff in the civil action; and, if he was acquitted, it may have been by collusion with the prosecutor. But, besides this, and upon more general grounds, there is no mutuality; the parties are not the same; neither are the rules of decision and the course of proceeding the same." (Greenleaf Ev., Lewis' Ed., Sec. 537, and authorities there cited.) From which, and from the following observations from the same author (Greenleaf Ev., Sec. 538), that * * * "there is a material difference between proving the existence of the record and its tenor, and using the record as the medium of proof of the matters of fact recited in it," "for" (he continues) "the judgment is conclusive evidence of the fact of its own rendition, but, as to the matters involved in the issue, it is *res inter alios acta*," it would seem to follow also that, even if it were recited in it that assured's insanity was in issue and decided against him (which, of course, was not the case), and certainly notwithstanding, as it alleged, that such

insanity actually was in issue, and, of course, decidedly adversely, nevertheless, the judgment and sentence would not be, in this case, competent even to prove such sanity, much less conclusive of it as a fact here, and so the fact that such insanity was in issue there, would be immaterial here.

It is difficult to perceive upon just what reasoning the learned District Judge, who presided at circuit, based his ruling sustaining the demurrers on this ground. If he was of opinion that the judgment and sentence in the criminal case were conclusive of themselves, he is opposed to the great weight of authority, no matter what was in issue there; if he concluded that the mere death of assured at the hands of the law by judicial sentence was fatal to the claim of plaintiffs in error, his view, so far from being supported by authority, is directly opposed to the reasoning and spirit of even Fauntleroy's case, and certainly to the entire argument and opinion of the Supreme Court of the United States, as voiced by Mr. Justice Harlan in Ritter v. The Mutual Life Insurance Company of New York, supra.

Plaintiffs in error submit that both the general and special demurrers sustained by the court below on this branch of the case should have been overruled.

## II.

The remaining question, which plaintiffs in error desire to present, arises under their third assignment of error, and its decision can, of course, become necessary only in event that the rulings and judgment of the court below questioned by their first and second assignments are reversed by this court.

This question is briefly: Can plaintiffs in error, if they can recover at all on the policy, claim also, in addition to the sum named in the policy, twelve per cent damages on such amount, together with all reasonable attorney's fees for the prosecution and collection of their claim, in virtue of the statute of the State of Texas authorizing such additional demand against any life or health insurance company, liable for a loss on a policy, and failing to pay same within the time specified in the policy after demand made therefor?

Plaintiffs in error contend that such recovery is permissible, and submit as a proposition hereunder:

## PROPOSITION.

The Statute of Texas, Revised Civil Statutes of Texas (1895), Title LVIII, Chapter 3, Article 3071, providing that:

"In all cases, where a loss occurs, and the life or health insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, twelve per cent. damages on the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of such loss," is not in contravention of, or obnoxious to, the fourteenth amendment to the Constitution of the United States.

## ARGUMENT.

Discussion of this question, as has already been stated in presenting the point in the brief, is only material in view of reversal of the judgment of the court below sustaining the demurrers complained of in the first and second assignments of error, and must necessarily be brief.

All that plaintiffs in error desire to observe regarding this question of their right to recover (in addition to their recovery, if any, of loss on the policy), twelve per cent. damages and reasonable attorney's fees, is that this statute of the State of Texas, the precise language of which is given in the proposition above, has received the construction and approval of the Supreme Court of the State in the case of The Union Central Life Insurance Co. v. Chowning (86 Texas, 654), decided before, and of both the Court of Civil Appeals for the Second Supreme Judicial District of Texas, and the Supreme Court of Texas, in the same case of The Fidelity and Casualty Co. of N. Y. v. Allibone (15 Texas, Civ. App., 178, and 90 Texas, 660), since the decision of the case of the Gulf, Colorado and Santa Fe Ry. Co. v. Ellis, hereinafter adverted to, these Texas Courts of Appeal holding that the statute in question was not obnoxious to the fourteenth amendment to the Con-

stitution of the United States, and that such claims for damages and reasonable attorney's fees were valid.

So far as plaintiffs in error have been able to discover, this precise statute has never received the construction of either this court or the Supreme Court of the United States, but, in criticism of it, the case of The Gulf, Colorado and Santa Fe Railway Company v. Ellis, decided by the Supreme Court of the United States (165 U. S., p. 150), is often cited. This latter was a case in which the Act of the Legislature of the State of Texas of April 5, 1889, (Sayles' Texas Civ. Stats., Supp. p. 368, Article 4266a), was examined and declared void as in contravention of the fourteenth amendment to the Constitution of the United States. This statute provided, in substance, that any person in the State of Texas having a valid bona fide claim for personal services rendered, or labor done, or for damages, or for over-charges on freight, or claims for stock killed or injured by the trains of any railway company, provided that such claim for stock killed or injured should be presented to the agent of the company nearest to the point of such killing or injury, against any railway corporation operating a railroad in this State, such claim not exceeding $50, might present his claim, verified by his affidavit, for payment to such corporation, and, if same should not be paid within thirty days after such presentation, might institute suit thereon in the proper court, and, if he finally established his claim, and obtained judgment for its full amount, should be entitled to recover, in addition to it and costs, also all reasonable attorney's fees, provided he had an attorney employed in his case, not to exceed $10, to be assessed and awarded by the court or jury trying the issue.

It is submitted that this decision is not decisive of the point raised in the case at bar, especially in view of the decisions of the higher courts of Texas, above quoted, on the very question in controversy. The question there decided is at best, only in a manner, analogous to the question here, and, after remarking that, as will be seen on pages 166-8, of the report, three of the justices of the Supreme Court of the United States, among whom was the Chief Justice, dissented (with a citation of authorities equal to that in the opinion of the whole court), it may suffice, in order to show upon what reasoning the decision was practically made, to quote

(pp. 165, 6) the closing words of Mr. Justice Brewer, who delivered it, viz: "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear, not only that a classification has been made, but also that it has been based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification and is not a mere arbitrary selection.

This, it would seem, would distinguish the Ellis case from the insurance cases quoted, as well as from the case at bar.

It is, therefore, submitted that the ruling of the Circuit Court sustaining the special exception of defendants in error on this point, ought also to be reversed.

As the fourth assignment of error is only in general terms and all questions arising under it have been already fully discussed, it is needless to say more regarding it than that it is, of course, insisted on.

Plaintiffs in error respectfully ask that the judgment and orders of the Circuit Court be reversed, and that the case be remanded, with such directions from this court as that a trial on the merits may be had.

GARDNER RUGGLES,
Attorney for Plaintiffs in Error.

## APPENDIX E.

## BRIEF AND ARGUMENT OF PETITIONERS, S. M. AND H. R. BURT, IN SUPPORT OF THEIR PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE FIFTH CIRCUIT.

To the Honorable the Supreme Court of the United States:

Petitioners, under submission, respectfully ask that this brief and argument be permitted to be filed and be considered by this court in connection with this application for a writ of certiorari in this case and in support thereof.

Although two questions were considered by the Circuit Court of Appeals in its opinion, but one was apparently regarded by that court in the actual decision of the case.

While, therefore, it might be necessary to argue only one, petitioners are advised that, inasmuch as it might possibly be gathered from the opinion of the Circuit Court of Appeals that that court thought either view decisive of the case, it may be as well briefly to discuss both.

The first question, seemingly resolved by the Circuit Court of Appeals in the affirmative, was whether or not the judgment and sentence to death of assured, William E. Burt, was conclusive in this case of the facts on which they were based.

The second question, and the one on which the Circuit Court of Appeals rested its decision, was whether or not it would be contrary to public policy to permit a recovery on the policy of insurance in controversy in this case, the assured having died at the hands of the law, by the sentence of a court of competent jurisdiction, notwithstanding he was innocent of the offense for which he was executed, the policy being silent as to the effect thereon of such death.

The Circuit Court of Appeals discussed the first question at no great length, although it intimated that there were not wanting authorities to support the proposition that such judgment would be conclusive.

However, it cited only two authorities on the subject and those two do not seem to bear out the court's assertion. The first, Coffey v. The United States, 116 U. S., 436, has already been adverted

to in the application for certiorari. In that case it will be observed that the parties to both the criminal proceeding and the civil suit were the same and that the issues as well as the subject matter in both were practically the same; in fact, the criminal proceeding and the civil suit were but parts of the same action. The second case is Roberts v. The State of New York, 160 N. Y., 217, 224. (30 Hun. N. Y., 106.) This case was one also in which the parties as well as the issues were identical with the parties and issues in the criminal proceeding complained of, but it actually decided no more than that Roberts failed to establish by a preponderance of the evidence, the burden being on him, the injustice of the conviction which formed the basis of his civil complaint.

It is respectfully submitted, therefore, that something more in the way of authority, at least, ought to be necessary to upset the rule, which Judge McCormick, in his dissenting opinion herein, aptly observes is elementary and has prevailed from time immemorial that "a verdict and judgment in a criminal case, although admissible to establish the fact of the mere rendition of the judgment, cannot be given in evidence in a civil action to establish the facts on which such judgment was rendered."

With regard to the second question, on its affirmative answer, to which, as has been said, the Circuit Court of Appeals really based its decision, petitioners, with all due respect to that learned court, are entirely unable to see wherein Fauntleroy's case resembles the case put by the court, or how its reasoning is applicable thereto.

Fauntleroy's case has been abundantly discussed in the petition for certiorari. It will be found in full in the Circuit Court of Appeals brief, Appendix A hereof, but it need hardly have been given in full, as it has recently been fully and elaborately discussed by this court in Ritter v. The Mutual Life Insurance Company of New York in 169 U. S., 139, nor is it needful to say more about it here than fact, as petitioners read it, and, as it was apparently read by this court in the Ritter case, it decided no more nor less than that it would be contrary to public policy to permit recovery in the courts on a policy the time of payment of which (being its only doubtful term) the assured had rendered certain by practically taking his own life.

To say, however, that a policy of life insurance expressly agreeing that payment should be made by the company, notwithstanding the death of assured at the hands of the law, provided he were innocent of the act for which he suffered, would be void upon the plainest principles of public policy, because tending to bring the judgments of the courts into disrepute, is to assert that which may itself well be questioned; but granting it, for argument's sake, to be law, it certainly does not follow as law also that, if an innocent person suffers by miscarriage of justice, his life insurance policy is thereby in effect forfeited, upon the same principles.

The only theory on which this last proposition could possibly be supported is that the judgment and death sentence are conclusive collaterally of the facts on which they were rendered, and so, after all, in spite of language, in spite of argument, the decision in the case of the Circuit Court of Appeals is forced back upon the proposition that the judgment and death sentence of assured, William E. Burt, in the criminal case, are not only evidence, but conclusive evidence in this case; not merely evidence of their own rendition, but evidence of all the facts on which they were rendered.

If this be the law, then the decision of the Circuit Court of Appeals ought to stand; if it is not the law, then that decision must be reversed, but, whatever the law may be, it ought to receive the final and authoritative sanction of this court, so as to put it beyond further doubt.

All these questions, or rather various phases of this question, were rather elaborately presented to the Circuit Court of Appeals by petitioners in their brief and argument filed in this cause in that court, and such authorities as they were able to find were therein called to its attention, and they now take the liberty of reproducing that brief in full as an appendix to this and pray this court to consider it as part of this brief.

Petitioners respectfully submit that the judgment of the Circuit Court of Appeals for the Fifth Circuit, ought to be in all things reversed, with such directions from this court as will enable them to have a trial upon the merits of their cause.

A. W. TERRELL,

Counsel for Petitioners, S. M. and H. R. Burt.

## APPENDIX C.

### OPINION OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

UNITED STATES CIRCUIT COURT OF APPEALS.
Fifth Circuit.
November Term, 1900.

Filed December 4, 1900.

S. M. and H. R. Burt, Plaintiffs in Error,
v. No. 864.
Union Central Life Insurance Company, Defendant in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

Before Pardee, McCormick and Shelby, Circuit Judges:

The case is stated in the opinion.

Mr. Gardner Ruggles was on the brief for plaintiffs in error.

Mr. Geo. E. Pendexter and Mr. Geo. E. Shelby were on the brief for defendant in error.

Shelby, Circuit Judge, delivered the opinion of the court.

This suit is on a life insurance policy and is brought by S. M. Burt and H. R. Burt, citizens of Texas, against the Union Central Life Insurance Company, a corporation chartered under the laws of Ohio. The policy was issued by the defendant on August 1, 1894, for $5000, on the life of William E. Burt, and was payable at his death to his wife, Anna M. Burt, if living, otherwise to the executors, administrators, or assigns of the insured, within sixty days after proof of death. The annual premiums for the policy were duly paid. The policy contained no provision for forfeiture in the event that the insured should be executed under sentence of the law. On September 10, 1895, Anna M. Burt and

William E. Burt assigned in writing to the plaintiffs, to whom they were indebted, a one-half interest in the policy. Anna M. Burt died intestate on July 24, 1896. She left surviving her no descendants, and her husband, William E. Burt, became entitled to any interest she had in the policy. By assignment from William E. Burt, and as his heirs and next of kin, the plaintiffs are the sole owners of the policy.

William E. Burt was indicted for the murder of Anna M. Burt in the District Court of Travis County, Texas, and was tried on November 27, 1896. In addition to the plea of not guilty, he plead insanity. He was found guilty by the jury of murder in the first degree, and was by the court sentenced to be hanged, and on May 27, 1898, pursuant to the sentence, he was executed by the Sheriff of Travis County, Texas. These facts are all alleged in the plaintiffs' petition. The petition then avers that the insured, William E. Burt, was in fact innocent of the crime of which he was convicted. To quote the petition as abridged by the plaintiffs' counsel: "Notwithstanding said conviction and sentence, said William E. Burt did not in fact commit said murder nor participate therein, but that, if he did, his policy was not avoided thereby because he was insane." The defendant demurred to the petition because it appeared therefrom that the insured died at the hands of the law under judgment of a court of competent jurisdiction. The Circuit Court, Judge Maxey presiding, sustained the demurrer. The plaintiffs declining to amend the petition, the case was dismissed. In this court it is assigned that the Circuit Court erred in sustaining the demurrer.

The industry of counsel has been able to find but one case in which a suit was brought on a life insurance policy when the insured had been tried and executed for the commission of crime. That case is the Amicable Society v. Bolland, 4 Bligh, N. R., 194, 211, and it is better known and oftener cited as the Fauntleroy case. It was an action by assignees in bankruptcy to collect a policy of insurance on the life of one Fauntleroy. The policy was made payable to his administrators or assigns. Fauntleroy was convicted of forgery, then a capital offense, and was

executed. The Lord Chancellor (Lyndhurst) delivered the opinion. After stating the case, he said: "The question under these circumstances is this: Whether the assignees can recover against the insurance company the amount of this insurance; that is to say, whether a party, effecting with an insurance company an insurance upon his life, and afterwards committing a capital felony, being tried, convicted, and finally executed, whether under such circumstances, the parties representing him, and claiming under him, can recover the sum insured in the policy so effected. I attended to the argument at the bar, in conjunction with the Noble Lord now present, and we have both come to the conclusion that the assignees cannot maintain this suit."

It appears to me that this resolves itself into a very plain and simple consideration. Suppose that in the policy itself, this risk had been insured against; that is, that the party insuring had agreed to pay a sum of money, year by year, upon condition that in the event of his committing a capital felony, and being tried, convicted and executed for that felony, his assignees shall receive a certain sum of money, is it possible that such a contract could be sustained? Is it not void upon the plainest principles of public policy? Would not such a contract (if available) take away one of those restraints operating on the minds of men against the commission of crimes—namely, the interest we have in the welfare and prosperity of our connections? Now, if a policy of that description, with such a form of condition inserted in it in express terms, cannot, on the grounds of public policy, be sustained, how is it to be contended that in a policy expressed in such terms as the present, and after the events which have happened, we can sustain such a claim? Can we, considering the policy, give to it the effect of that insertion, which, if expressed in terms, would have rendered the policy, as far as that contention went at least, altogether void." This case has been cited approvingly in many text-books on insurance and by the Supreme Court of the United States. Ritter v. Mutual Life Insurance Company of New York, 169 U. S., 139. That it correctly states the law has never been questioned so far as we know. It is quoted and relied on by the

learned counsel for both parties to this suit. It is conceded, however, that there is a material difference between the facts of that case and this. Here the petitioners aver that the insured was guiltless, although convicted and executed. They aver in another count that, if he actually killed his wife, he was insane when he committed the act, and that the defense of insanity was presented unsuccessfully at the trial. If the insured did commit the homicide when insane, he was not guilty of murder. The meaning of the petition, therefore, is that at the trial of Burt, the insured, there was a miscarriage of justice—that he was unjustly convicted. It must be and is conceded as settled law that, if he had been rightfully convicted, his assignees could not recover on the policy because, as was held in the Fauntleroy case (stating the point most favorably for the plaintiffs in error), the policy would have been void if it had expressly provided for payment of the amount thereof on the just conviction and execution of the insured. Does a contract for insurance, having no special provision on the subject, cover the loss when the insured is tried and condemned in and executed by an order of a court of competent jurisdiction, when he is in fact innocent of the crime with which he is charged? This precise question, we are advised by counsel, has never been decided. We will apply to the question the illustration used by the court in the Fauntleroy case. Would the policy sued on have been valid if it had provided, in the event of the insured's being indicted, tried, convicted, and executed for murder, when in fact he was innocent, that the amount of the policy should be paid to his administrators or assigns? This condition would not be as encouraging to the insured determined on crime as that supposed by Lord Lyndhurst, but it would at least let him understand that the provision he had made by insurance for those connected with him would not be conclusively lost by his conviction and execution—that the beneficiaries would have a right of action on the policy with chances of success, even if he was apprehended, convicted and executed.

It is well settled that no one can lawfully contract to do that which has a tendency to be injurious to the public or against the

public good. Can there be a legal life insurance against the miscarriage of justice? Can contracts be based upon the probability of judicial murder? If one policy so written be valid, the business of insuring against the fatal mistakes of juries and courts would be legitimate. The same principle could be applied, in a kind of accident insurance, to the miscarriage of justice in cases that led to convictions and punishments not capital. And in each suit to enforce such a policy the issue as to the fatal judicial mistake would be tried by another court and jury not infallible. That juries and courts do make mistakes is unquestionable. It may be admitted that the history of criminal juri-prudence shows that innocent defendants have in rare instances, by a departure from proper rules of evidence, been convicted of murder and executed. Cases in which the juries, the courts, and the pardoning power are so at fault, are so rare that they are not likely to be in the contemplation of parties making contracts of life insurance. The terms of the contract of life insurance, it seems, would exclude the idea, as in the case of suicide by the insured while sane, that death at the hands of the law was within the contemplation of the contracting parties. Ritter v. Mutual Life Insurance Company of New York, 169 U. S., 139. But if the parties make express contracts on the subject, could the courts lawfully enforce them? It is the policy of every State or organized society to uphold the dignity and integrity of its courts of justice. Such contracts would be speculations upon whether the courts would do justice. They would tend to encourage a want of confidence in the efficiency of the courts. They would tend to stir up litigation—litigation that would reopen tried issues. They would impress the public with the belief that the results of trials of the gravest kinds were so uncertain that the innocent could not escape condemnation by a jury and unjust judgment by the court, or obtain pardon by the executive. Such contracts would encourage litigation and bring reproach upon the State, its judiciary and executive, and would, we think, be against public policy and void. The policy of the law often permits and even requires for error a new trial of a convicted defendant, but never after his execution. The

principle that makes void a wagering contract as to a rise or fall in the price of goods in the markets (Irwin v. Williar, 110 U. S., 499) would make void for stronger reasons a contract based on the failure of courts and juries to perform their respective duties. Now, to apply the reasoning of Lord Lyndhurst in the Fauntleroy case, if a policy with such a form of condition inserted in it in express terms cannot on grounds of public policy be sustained, a policy without such a condition cannot be enforced on the averment of facts which, if embraced in the written contract, would have made the policy to that extent void.

In some cases it has been held that a trial and conviction or acquittal in a criminal case is conclusive as to the facts decided when brought in question by the parties in a subsequent civil suit. Coffey v. United States, 116 U. S., 436; Roberts v. State of New York, 160 N. Y., 217, 224, and 30 Hun. (N. Y.), 106. But the authorities on this subject are conflicting. 1 Freeman on Judgments (4th ed.), Sec. 319, and cases there cited. The assignee takes the policy subject to all defenses and equities which attached to it in the hands of the assignor. Bliss on Life Insurance, Sec. 331. If the judgment of conviction against Burt is conclusive as to his guilt in this suit by the assignees of the policy, this case would be brought precisely within the principle decided in the Fauntleroy case, for the averment in the petition of the conviction of Burt would avoid the effect of the allegation of his innocence. But we prefer to base our conclusion on the ground that a contract of life insurance, written to insure against a capital conviction in the established courts of competent jurisdiction in the event that such conviction is unjust and unwarranted by the evidence, is void as being against public policy.

The judgment of the Circuit Court is affirmed.

## APPENDIX D.

## DISSENTING OPINION OF McCORMICK, CIRCUIT JUDGE, IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

(Filed December 1, 1900.)

No. 864.

S. M. BURT and D. R. BURT, Plaintiffs in Error.

v.

UNION CENTRAL LIFE INSURANCE COMPANY OF CINCINNATI, Defendant in Error.

McCormick, Circuit Judge, dissents.

I cannot concur in the judgment of the court in this case. It seems to me that the case does not call in question in any manner, or come under the authority of, or the reasoning in the case of Amicable Society, etc., v. Bolland, 4 Bligh, N. R., 194, 211.

The action might very well have been brought in the common form on the policy of insurance and left it to the defendant to raise by its answer the questions that are herein raised. The plaintiffs, being so advised, chose to raise the question as they have done in their petition. The petition implies, if it does not expressly announce, that if the insured was in fact guilty of murder, and his death occurred by the execution of the sentence against him for that crime, the proof of such facts would avoid the civil contract on which this action is brought. The holders of the policy, however, expressly allege that the assured did not commit the homicide charged against him, and that if he did commit the homicide he was in such condition of mental disorder as rendered him incapable at the time of committing murder. They alleged that these pleas were presented on the trial of the indictment against the assured, and that on that trial, in a court of competent jurisdiction, the verdict and judgment were rendered against him and sentence of death pronounced upon him and executed. The demurrer, which was sustained in the Circuit Court, must assume either that the death of the assured by a

judicial sentence for crime, though in fact he was wholly innocent and merely the victim of mistake or miscarriage of justice, avoids the policy; or that the judgment of conviction in the criminal case is not only admissible to prove both the sanity and the guilt of the accused, but that it is conclusive evidence of both. I fully concur with counsel for the plaintiffs in error that the first question has never been directly heretofore decided. It is certainly not decided in either the Fauntleroy case or the Ritter case. The first of those cases proceeds upon the admission or assumption that the assured was guilty of forgery as charged, and for which he was executed, no question being made as to his mental condition. In the latter case the question of the assured's sanity was submitted to the jury in the civil suit, and on the evidence and under the charge of the court the jury found against the policy holder. While the elaborate argument in the opinion of the Supreme Court announcing the decision in the case does not show that, if the insanity of the assured had been shown, his suicide while in that condition would not have avoided the policy, it seems to me to strongly imply that it would not.

It seems to me that the ruling of the Circuit Court cannot be sustained except upon the second ground indicated above, and that the practical effect of the judgment of this court is to set aside a general rule, which has received immemorial recognition, to the effect that "a verdict and judgment in a criminal case, though admissible to establish the fact of the mere rendition of the judgment, cannot be given in evidence in a civil action to establish the facts on which it was rendered." This is elementary. The reason of the rule, as expressed by Mr. Greenleaf, is: "If the defendant was convicted, it may have been upon the evidence of the very plaintiff or party claiming the benefit in the civil action; and if he was acquitted it may have been by collusion with the prosecutor." But, beside this, and upon more general grounds, there is no mutuality; the parties are not the same; neither are the rules of decision and the course of proceeding the same. "The judgment of a court of competent jurisdiction, being a public transaction rendered by public authority, is presumed to be faithfully recorded. It is therefore the only proper legal evidence of itself, and is conclusive evidence of the fact of

the rendition of the judgment and of all the legal consequences resulting from that fact, whoever may be parties to the suit in which it is offered in evidence. Thus, if one indicted for an assault and battery has been acquitted and sues for malicious prosecution, the record of acquittal is evidence for the plaintiff to establish that fact, notwithstanding the parties are not the same; but if he were convicted of the offence, and then is sued in trespass for the assault, the record in the former case would not be evidence to establish the fact of the assault, for, as to matters involved in the issue, it is ***res inter alios acta.***" 1 Greenleaf's Evidence, Sections 537, 538.

I am unable to see why public policy (which) not only does not forbid, but seems to require the courts of public justice, at the suit of proper parties, to make new inquiry as to the guilt of one who had been criminally charged and convicted, of making an assault should forbid the making of the inquiry sought to be made in this case as to the real guilt of the assured in the matter for which he was charged, tried and executed. It seems to me that the public interest and a sound public policy give stronger support to the general rule in a case like the present than in a suit for damages by one claiming to have been assaulted by a defendant who had been convicted therefor in a criminal prosecution. In the case of Coffey v. United States, 116 U. S., 436, the parties to the civil suit were the same as the parties in the criminal action; the subject matter was the same; the civil suit, if we may call it so, being for the recovery of a part of the punishment denounced by the penal statute against a crime charged in the criminal action. In that case the court says: "In both proceedings, criminal and civil, the United States are the party on one side and this claimant the party on the other. The judgment of acquittal in the criminal proceeding ascertained that the facts which were the basis of this one, and which are made by the statute the foundation of any punishment, personal or pecuniary, did not exist. This was ascertained once for all, between the United States and the claimant, in the criminal proceeding, so that the facts cannot be again litigated between them, as the basis of any statutory punishment denounced as a consequence of the existence of the facts."

In the case of Roberts v. State, 160 N. Y., 213, the parties in the civil action were the State of NewYork and the claimant, being the same as the parties in the criminal action. And it is not held, as I read the decision, that the judgment of conviction in the criminal action was conclusive as to the fact of the guilt of the accused. On the contrary, the opinion asserts: "It was therefore incumbent upon him, the claimant, to establish that he was improperly convicted and imprisoned, and the amount of damages he had sustained by reason thereof. While a great volume of evidence was given upon the second question, the amount of damages, we find nothing in the record which justified the board in finding that his conviction and imprisonment were improper, but, instead, the evidence upon which he was convicted and the judgment of conviction were introduced, both of which show that his conviction was proper; the former presumptively and the latter conclusively." By this last word "conclusively" the court could not have meant that no other evidence on that subject should have been received, because if that had been their meaning, they would at once have held that the act of the Legislature which authorized the proceeding was a void act, for this act recited upon its face that the claimant had been convicted and imprisoned for the alleged crime of burglary, and no question appears to have been made either in the act or before the Board of Claims that the conviction was not had in a court of competent jurisdiction.